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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

[redacted]

B5

DATE: NOV 23 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. The director served the petitioner with two notices of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a software development and consulting services company. It seeks to employ the beneficiary permanently in the United States as a management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750 Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. On February 23, 2007, the director issued his first NOIR providing the petitioner an opportunity to rebut the ability to pay basis for revocation. In reviewing the response to his first NOIR, on October 15, 2007, the director issued the second NOIR informing the petitioner of adverse information about the beneficiary's qualifications and requesting evidence to rebut this additional ground for revocation. In the NOR, the director determined that the evidence shows that the petitioner failed to timely submit evidence in rebuttal to the director's NOIR and revoked the approval of the petition accordingly.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel asserts that the director did not mail the NOIR to the correct address for the petitioner and thus, the petitioner could not timely respond. Counsel makes no arguments with respect to the underlying ability to pay question and presents no additional evidence to overcome the director's basis for revocation. However, the AAO notes that the record contains evidence submitted in response to the director's NOIR thereby undermining the credibility of counsel's argument. Moreover, counsel should have submitted any additional or new evidence of ability to pay on appeal, regardless of whether or not the NOIR was received. The fact that the NOIR was mailed to a wrong address itself cannot overcome the grounds of the director's NOR. Even though the director did not revoke the approval of the petition on the basis of failure to submit evidence to rebut the ground for revocation in the director's NOIR, the AAO finds that the

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[1] The record shows that while the instant appeal is pending with the AAO, another petitioner filed a Form I-140 immigrant petition (LIN-08-222-51167) on behalf of the instant beneficiary on August 5, 2008 with a new labor certification which is currently pending with the Nebraska Service Center.

director initially approved the petition in error and the approval of the petition must be revoked for the following reasons.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in response to the director's NOIR and on appeal.[2]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a Bachelor of Commerce Degree awarded by the University of Delhi on May 3, 1986, a Diploma in Business Management awarded by the Institute of Management Technology (IMT) on June 1, 2001, a diploma from the National Institute of Labor Education & Management on June 21, 1999, and various certificates from the Institute of Management and Labor Studies issued in 1996. The issue in this case is whether the beneficiary's degree, diploma and certificates constitute a foreign degree equivalent to a U.S. baccalaureate degree.

Eligibility for the Classification Sought

As noted above, DOL certified the Form ETA 750 in this matter. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. The AAO must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a "4-year course of undergraduate study." S. Rep. No. 101-55 at 20 (1989). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience

equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive post baccalaureate experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2). In the instant case, the beneficiary's bachelor of commerce degree and statement of marks show that the beneficiary's bachelor of commerce degree is a three-year bachelor's degree, and therefore, the degree alone or a combination with any other multiple lesser degrees or diplomas will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree.

The AAO has also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

According to EDGE, a three-year Bachelor of Commerce degree from India is comparable to "three years of university study in the United States." EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education, and postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree. EDGE further states that a postgraduate diploma following a three-year bachelor's degree "represents

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[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

attainment of a level of education comparable to a bachelor's degree in the United States." However, the "Advice to Author Notes" section states:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the [redacted] for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

In the instant case, the record does not contain any evidence establishing that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a three-year bachelor's degree was required for admission into the program of study.

The degree must also be from a college or university. Specifically, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction).

Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The record does not contain any official academic record showing that the beneficiary's Diploma in Business Management awarded by Institute of Management Technology, Diploma from National Institute of Labor Education & Management, and various certificates from Institute of Management and Labor Studies were issued by a college or university.

Because the beneficiary has neither (1) a U.S. degree above a baccalaureate or a foreign equivalent degree nor (2) a U.S. baccalaureate degree or foreign equivalent degree in business or finance and five years of progressive experience in the specialty, the beneficiary does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien employment certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to

determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the alien employment certification reflects the following requirements:

Block 14:

Education: 5-year college studies and a master's degree in business or finance.

Block 15: Will accept Bachelor's Degree in major field of study plus five years of progressive professional experience to equate a Master's Degree.

The beneficiary possesses a three-year Bachelor of Commerce Degree from the University of Delhi, a Diploma in Business Management from the Institute of Management Technology, a Diploma from the National Institute of Labor Education & Management and various certificates from the Institute of Management and Labor Studies. However, none of them meets the educational requirement set forth on the Form ETA 750, i.e. a master's degree in business or finance, or a bachelor's degree in business or finance.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the alien employment certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved, and thus, the director initially approved the petition in error. Therefore, the director has good and sufficient cause for revoking the approval.

Beyond the director's decision, the AAO finds that the director has additional good and sufficient cause for revoking the approval of the petition. The AAO will discuss whether the petitioner established its continuing ability to pay the proffered wage from the priority date to the present. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The director raised this issue in his first NOIR. However, the director erroneously determined that the petitioner overcame this ground upon receipt of the petitioner's response to his first NOIR. USCIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 4, 2001 and certified on October 21, 2002 initially on behalf of the original beneficiary, Tolulope Fagbore.[4] The proffered wage as stated on the Form ETA 750 is $67,244 per year. The Form I-140 petition on behalf of the instant beneficiary was submitted on January 2, 2004. The instant petition is for a substituted beneficiary.[5] On the petition the petitioner claimed to have been established in 1996, to have a gross annual income of $17,600,000, and to currently employ 112 workers.

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[4] The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

[5] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the Department of Labor (DOL) at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's continuing ability to pay the proffered wage. That further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." The petitioner claims to employ more than 100 employees on the petition and with the initial filing, the petitioner did not submit any regulatory-prescribed evidence to establish its ability to pay the proffered wage as of the priority date but a letter, dated December 22, 2003, from [redacted], regarding its ability to pay the proffered wage.

However, given the record as a whole and the petitioner's history of filing petitions, we find that USCIS need not exercise its discretion to accept the letter from [redacted] The AAO notes that [redacted] is not a financial officer of the petitioner, but a manager of U.S. Operations. The regulation does not allow this office to accept a letter from a manager other than the financial officer of the petition as evidence to establish the petitioner's ability to pay the proffered wage in lieu of regulatory-prescribed evidence. USCIS records indicate that the

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rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

petitioner has filed 98 Form I-140 petitions. In addition, the petitioner has also filed 934 Form I-129 nonimmigrant petitions. Consequently, USCIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that it has the ability to pay combined salaries of more than $6,500,000. Given that the number of immigrant and nonimmigrant petitions reflects an increase of nine times the petitioner's current workforce, we cannot rely on a letter from [redacted] referencing the ability to pay a single unnamed beneficiary. Furthermore, neither the letter nor any evidence in the record shows that [redacted] is a financial officer of the petitioner.

The AAO concurs with the director's finding that the petition was approved in error, and thus, finds that the director had good and sufficient cause for revoking the approval and also served the petitioner the NOIR. Both *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) held that a NOIR should be properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

On appeal, counsel asserts that neither the petitioner nor counsel received the NOIR and submitted affidavits from both. Counsel asserts that the director mailed the NOIR to a wrong address and counsel's office temporarily closed due to counsel's pregnancy. Counsel asserts that the director typed the street name as "telegrapoh" instead of telegraph. It is unlikely that the mail cannot be delivered because one word in the street name was mistyped and the record does not contain any objective evidence from the post office showing that the mail was not delivered and that non-delivery could result from mistyping the word "telegraph." It is counsel's responsibility to keep updating the contacting information for herself and the petitioner for any pending petitions. In addition, the record contains the response to the director's February 23, 2007 NOIR which was received by the director on March 28, 2007. In the response, counsel submitted additional evidence to establish that the petitioner had its ability to pay the beneficiary the proffered wage from the priority date to the present. The AAO will consider all the evidence submitted in the record to determine whether the petitioner established its continuing ability to pay the proffered wage and further to determine whether the petitioner rebut the ground of ineligibility in the director's NOIR.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted a W-2 form for 2001 issued to the original beneficiary. The original beneficiary's W-2 form for 2001 shows that the petitioner paid the original beneficiary $64,211.28 in 2001. Although wages

already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present in general, in this case, the instant petition was filed to substitute the original beneficiary based on the labor certification certified for the original beneficiary, and therefore, the AAO will consider wages paid to the original beneficiary since the priority date in determining the petitioner's ability to pay the proffered wage from the priority date to the present.[6] However, the petitioner did not submit any documentary evidence showing that it paid any compensation to the instant beneficiary. Therefore, the petitioner failed to demonstrate that it paid the beneficiary the proffered wage from the priority date to the present, and thus it must demonstrate that it had sufficient net income or net current assets to pay the difference of $3,032.72 in 2001 between wages paid to the original beneficiary and the proffered wage and the full proffered wage of $67,244.00 per year in 2002 through the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

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[6] As previously mentioned, the record contains the original beneficiary's W-2 form issued by the petitioner for 2001 showing that the petitioner paid the original beneficiary $64,211.28 in 2001.

> accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The record contains the petitioner's federal income tax returns for 2001 through 2005. The petitioner's tax returns demonstrate its net income for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120 stated net income[7] of $106,512.
- In 2002, the Form 1120 stated net income of $83,011.
- In 2003, the Form 1120 stated net income of $74,405.
- In 2004, the Form 1120 stated net income of ($183,563).
- In 2005, the Form 1120 stated net income of $122,525.

Therefore, for the year 2001, the petitioner had sufficient net income to pay the difference of $3,032.72 between wages paid to the original beneficiary and the proffered wage; for 2002, 2003, and 2005, the petitioner had sufficient net income to pay the instant beneficiary the full proffered wage of $67,244.00 per year; however, for the year of 2004, the petitioner had a negative net income which was not sufficient to pay the instant beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are

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[7] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most

shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Counsel submitted incomplete copies of the petitioner's tax returns for 2001 through 2005, and the petitioner's tax returns do not include schedule Ls. The record does not contain any other documentary evidence such as the petitioner's annual reports or audited statements demonstrating its end-of-year net current assets for these years. Without the documentary evidence, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the instant beneficiary the proffered wage in 2004.

The record before the director closed on March 28, 2007 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's annual report, federal income tax return or audited financial statements for 2006 should have been available. Counsel stated that the petitioner's Form 1120 for 2006 has not been completed by the accountants at the time of appeal, however, she did not submit any documentary evidence showing that the 2006 tax return filing deadline had been extended, nor did she provide any explanation why the complete copy of tax returns for 2001 through 2005 and the annual report or audited financial statements for 2006 were not submitted. The record before this office closed on May 22, 2008 with the receipt by the AAO of counsel's brief in support of the instant appeal. As of that date, the petitioner's annual report, federal income tax return or audited financial statements for 2007 should have been available. However, the petitioner did not submit its annual reports, federal tax returns, or audited financial statements for 2006 and 2007 and complete copies of tax returns for 2001 through 2005, nor did counsel explain why these documents were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide its annual reports, complete copies of federal tax returns or audited financial statements for these years. The annual reports, tax returns or audited financial statements would have demonstrated the amount of taxable income and net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The petitioner failed to establish its ability to pay the proffered wage for these years because it failed to submit requested evidence that precludes a material line of inquiry.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the ability to pay the instant beneficiary the

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cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

proffered wage for 2004, 2006 and 2007 through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel submitted bank statements on the petitioner's business checking account and asserted that the balance in the petitioner's bank account was sufficient to establish the petitioner's ability to pay the proffered wage in this case. However, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, any funds used in one month would no longer be available in future months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that would be considered in determining the petitioner's net current assets.

Counsel also asserted that the petitioner had a credit line of $1,500,00 with a bank which could be used to pay the instant beneficiary the proffered wage in the relevant years. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment T*erms, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Moreover, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single

beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, USCIS records show that the petitioner has filed at least 98 Immigrant Petitions for Alien Worker (Form I-140), including 6 in 1999, 15 in 2000, 17 in 2001, 16 in 2002, 19 in 2003, 7 in 2004, 5 in 2005, 2 in 2006, 10 in 2007 and 1 in 2010. Therefore, relevant to the instant case, the petitioner was obligated to demonstrate its ability to pay 17 proffered wages in 2001, 16 in 2002, 19 in 2003 7 in 2004 and 5 in 2005.[9] The record does not contain any documentary evidence showing that the petitioner paid any of these additional beneficiaries in any of the relevant years.

In 2001, the petitioner must establish its ability to pay 17 proffered wages, and therefore, the petitioner needs at least net income or net current assets of $1,143,148.[10] However, as previously discussed, the record does not contain documentary evidence for the petitioner's net current assets; and the petitioner's tax return shows that the petitioner had net income of $106,512. While the petitioner's net income was sufficient to pay the difference of $3,032.72 between wages actually paid to the original beneficiary of the underlying labor certification and the proffered wage, it was not sufficient to 17 proffered wages. Therefore, the petitioner failed to demonstrate that it had ability to pay all proffered wages that year.

In 2002, the petitioner must establish its ability to pay 16 proffered wages, and therefore, the petitioner needs at least net income or net current assets of $1,075,904. However, as previously discussed, the record does not contain documentary evidence for the petitioner's net current assets; and the petitioner's tax return shows that the petitioner had net income of $83,011. While the petitioner's net income was sufficient to pay the instant beneficiary the proffered wage, it was not sufficient to 16 proffered wages. Therefore, the petitioner failed to demonstrate that it had ability to pay all proffered wages that year.

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[9] Because the petitioner must demonstrate that it had the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence, the actual number of proffered wages the petitioner was responsible for would be greater than the number of the petitions the petitioner filed in a certain year.

[10] The record does not contain information about the proffered wages for each of these 17 petitions, therefore, the AAO assumes that the petitioner offered the same proffered wage with the one in this case to each of other beneficiaries.

In 2003, the petitioner must establish its ability to pay 19 proffered wages, and therefore, the petitioner needs at least net income or net current assets of $1,277,636. However, as previously discussed, the record does not contain documentary evidence for the petitioner's net current assets; and the petitioner's tax return shows that the petitioner had net income of $74,405. While the petitioner's net income was sufficient to pay the instant beneficiary the proffered wage, it was not sufficient to 19 proffered wages. Therefore, the petitioner failed to demonstrate that it had ability to pay all proffered wages that year.

In 2004, the petitioner must establish its ability to pay 7 proffered wages, and therefore, the petitioner needs at least net income or net current assets of $470,708. However, as previously discussed, the record does not contain documentary evidence for the petitioner's net current assets; and the petitioner's tax return shows that the petitioner had a negative net income. The petitioner's net income was insufficient to pay a single proffered wage. Therefore, the petitioner failed to demonstrate that it had ability to pay all proffered wages that year.

In 2005, the petitioner must establish its ability to pay 5 proffered wages, and therefore, the petitioner needs at least net income or net current assets of $336,220. However, as previously discussed, the record does not contain documentary evidence for the petitioner's net current assets; and the petitioner's tax return shows that the petitioner had net income of $122,525. While the petitioner's net income was sufficient to pay the instant beneficiary the proffered wage, it was not sufficient to pay five proffered wages. Therefore, the petitioner failed to demonstrate that it had ability to pay all proffered wages that year.

For 2006 and 2007, counsel did not submit any regulatory-prescribe evidence, such as annual reports, tax returns or audited financial statements, to establish that the petitioner had sufficient net income or net current assets to pay the instant beneficiary and the other two and ten beneficiaries in 2006 and 2007 respectively their proffered wages although these documents should have been available at the time the instant appeal was filed. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay all proffered wages for 2006 and 2007 because it failed to submit regulatory-prescribed evidence for these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wages as of the priority date to the present through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which

the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. The petitioner had failed to establish its ability to pay all proffered wages for all relevant years in this case. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

Counsel's assertions in response to the director's NOIR and on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay all beneficiaries of the approved and pending immigrant petitions their proffered wages from the day the Form ETA 750 was accepted for processing by the DOL to the present. The petitioner failed to rebut the ground of ineligibility in the director's NOIR. Accordingly, the approval of the petition must be revoked.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.